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No. 97-1139

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

UNITED STATES OF AMERICA,
Petitioner,

v.

JACINTO RODRIGUEZ-MORENO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENT JACINTO RODRIGUEZ-MORENO

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QUESTION PRESENTED

Whether venue in a prosecution under 18 U.S.C. § 924(c)(1) is proper in a district where the defendant neither used nor carried a firearm?

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BRIEF FOR RESPONDENT JACINTO RODRIGUEZ-MORENO

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-56a) is reported at 121 F. 3d 841.

JURISDICTION

Respondent is satisfied with and generally adopts the government's statement of Jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

1. Article III, Section 2, Clause 3 of the United States Constitution provides as follows:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

2. The Sixth Amendmeent to the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

3. Section 924(c)(1) of Title 18, United States Code, provides in pertinent part as follows:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years[.]

4. Section 3237(a) of Title 18, United States Code, provides in pertinent part as follows:

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

5. Rule 18, Federal Rules of Criminal Procedure, provides as follows:

> Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice.

STATEMENT OF THE CASE

Respondent was convicted of kidnapping Ephrain Avendano and using a firearm during the commission of that kidnapping.[1] Pet. App. 2a. Mr. Avendano was the middle man in a large scale cocaine transaction that fell apart when Mr. Avendano's cohort "Baldy" absconded with the unpaid for drugs. Baldy left Avendano in Texas to deal with the sellers, defendants Torres-Montalvo and Pacheco. Pet. App. 3a-4a.

Respondent was originally charged with the cocaine conspiracy but the trial judge dismissed that charge against him at the end of the government's case in chief. The trial judge found that respondent's assistance in helping to locate the purchasers of the drugs did not make him a conspirator in the drug transaction which had been completed well in advance of respondent's involvement. Pet. App. 7a-8a.

After an unsuccessful search for the purchasers of the cocaine in Texas, New Jersey and New York, the defendants and Mr. Avendano arrived in Maryland. There, respondent threatened Mr. Avendano with a handgun not previously carried or used, a Dan Wesson, Model CTG

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[1] Respondent and his five codefendants were convicted of other crimes involved in this incident and those convictions are not implicated in this appeal.

.357 magnum.[2] Pet. App. 6a. That weapon appeared for the first time while the defendants and Mr. Avendano were staying in Maryland. It is undisputed that the weapon was never used or carried in the State of New Jersey. Pet. App. 9a.

Respondent alone was charged with violating 18 U.S.C. § 924(c)(1). Indictment 95-70 charges, in pertinent part:

COUNT FIVE

2. From on or about December 12, 1994 through on or about January 2, 1995, at Middlesex County, in the District of New Jersey, and elsewhere, defendant

JACINTO RODRIGUEZ-MORENO[3]

did knowingly and willfully use and carry a firearm, namely a Dan Wesson, Model CTG .357 magnum, serial number 357S003434, during and in relation to crimes of violence, namely the unlawful kidnapping of Ephrain Avendano as charged in Count Two, and the unlawful kidnapping of Marbel Avendano as charged in Count Three, and a drug trafficking crime, namely, the unlawful conspiracy to distribute and possess with intent to distribute approximately 30 kilograms of cocaine, as charged in Count Four.

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[2] Mr. Avendano eventually escaped from the defendants and went to a local police station in Maryland where he gave a detailed, hand written seven page statement. Mr. Avendano signed each page and the police officer witnessing the statement signed each page. That seven page statement never once mentioned respondent's use of the gun set forth in count five of the indictment. Nonetheless, respondent was convicted of the charge. J.A. 30-34.

[3] The indictment originally contained a number of aliases for Mr. Moreno (J.A. 12-20), but no proof was presented that Mr. Moreno had any aliases and those names were struck from the indictment by the trial court. J.A. 42.

In violation of Title 18, United States Code, Sections 924(c)(1) and 2.

While the indictment itself asserted proper venue in New Jersey, the proofs at trial did not support the venue allegation in count five. There is no dispute that count five was factually incorrect in many respects. First, the dates were wrong. The proofs at trial showed the particular weapon was only used and/or carried on January 1, 1995 at the earliest, not December 12, 1994. Second, the place was wrong. The weapon was never carried in New Jersey, only in Maryland. Third, the weapon was not used in connection with the kidnapping of Marbel Avendano. Fourth, the weapon was not used in connection with the drug conspiracy, a charge which was eventually dismissed, as against Respondent, by the trial judge at the end of the government's case. In short, there was little or nothing alleged in count five which was factually correct.

At the close of the government's case in chief, respondent moved to dismiss count five on venue grounds.[4] The trial court denied the Motion for Judgment of Acquittal brought pursuant to Federal Rule of Criminal Procedure 29. In denying the motion the trial court relied on the decision in *United States v. Pomranz*, 43 F. 3d 156 (5th Cir.), *cert. denied*, 516 U.S. 986 (1995), and rejected the decision in *United States v. Corona*, 34 F. 3d 876 (9th Cir. 1994).

Respondent was sentenced to 87 months imprisonment on counts one, two and three, all to run concurrently,

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[4] Had the indictment properly advised the defendant that the only acts supporting count five occurred in Maryland, the defendant would have had to raise his venue challenge before trial. When, however, the indictment asserts proper venue but the government fails to establish venue at trial, the defendant can move for judgment of acquittal at that time. *United States v. Sardini*, 803 F.2d 123, 127 (3d Cir. 1986), *cert. denied sub nom, Moody v. United States*, 479 U.S. 1093 (1987).

and a consecutive sentence of 60 months imprisonment on count five for a total sentence of 147 months imprisonment. Pet. App. 8a, n.2.

Respondent filed a Notice of Appeal and his case was heard in the United States Court of Appeals for the Third Circuit on November 12, 1996. On July 30, 1997, a divided panel of that court reversed respondent's conviction on count five. All of respondent's and codefendants' other convictions were affirmed. Pet. App. 40a.

The government filed a petition for rehearing *en banc* as to the count five venue question only and that petition was denied on September 26, 1997. J.A. 4-5.

SUMMARY OF ARGUMENT

Article III, Section 2, Clause 3 of the Constitution states that "The Trial of all Crimes . . . shall be held in the State where said Crimes shall have been committed." The Constitutional provisions, however, "do not furnish guidance for determination of the place of the crime. That place is determined by *the acts of the accused* that violate a statute. *Johnston v. United States,* 351 U.S. 215, 220 (1955) (emphasis added). Venue issues are discrete; in each case the statute must be analyzed to determine the "nature of the crime alleged and the location of the act or acts constituting it." *United States v. Cabrales,* 118 S. Ct. 1772, 1776 (1998) (quoting *United States v. Anderson,* 328 U.S. 699 (1946)). In deciding where an offense was committed and thus where venue lies, "the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *Cabrales,* 118 S. Ct. at 1776 (quoting *Anderson,* 328 U.S. at 703).

Venue is determined by the acts of the accused that violate a statute, *i.e.*, the actus reus element of the offense. This Court, as well as every lower court that has analyzed a venue issue, has generally performed the same analysis

—the terms of the statute are analyzed to determine the proscribed conduct (*i.e.*, the actus reus), then it is determined where that conduct was "committed," and thus where venue lies. Pursuant to this accepted analysis, the Third Circuit correctly determined that the firearm offense was "committed" in Maryland.

The *actus reus* element of 18 U.S.C. § 924(c)(1) is the *use* or *carrying* of a firearm *during* and in relation to a crime of violence. Congress enacted the statute to punish the unlawful use of firearms. While the commission of an underying felony is an element of 18 U.S.C. § 924(c)(1), the underlying offense is not the actus reus of 18 U.S.C. § 924(c)(1).

In this case, there is no dispute that the firearm which respondent was charged with using was used only in the State of Maryland and in no other place. Respondent's trial on the 18 U.S.C. § 924(c)(1) charge could be held only in the State and District of Maryland and at no other place.

The crime of using a firearm during the commission of a violent crime "begins" when the gun is first used or carried during the violent crime and "ends" when a gun is no longer used or carried during the violent crime. In other words, this crime is committed only when a gun is used or carried and not when the underlying crime occurred.

Prosecuting the firearm offense anywhere other than Maryland, where the crime was "committed," would disrespect the Constitutional provisions and the policies underlying them. The Constitution demands that crimes be prosecuted where the crime is "committed"; and the Constitutional safeguards of venue are for the protection of the accused, not the government. Finally, the "acts" test, while respecting the Constitutional venue provisions, will not seriously impede the effective prosecution of firearm crimes or other crimes as the government suggests.

ARGUMENT

The government argues that the trial for a criminal offense may be conducted in any district where an essential element of the crime occurred. Br. of Petitioner at 24.[5] The government's position is incorrect. The government's reliance on an "essential elements" test is unfounded and unworkable. It would expand venue well beyond the limits set in the Constitution and adopted by this Court. The test adopted by this Court is not an essential elements test, but a "nature of the crime" or "*actus reus*" test.[6] As this Court stated in *Anderson* and *Cabrales*, the *locus delecti* must be determined from the *nature of the crime alleged* and the location of the act or acts constituting it." *Cabrales*, 118 S. Ct. at 1776 (quoting *Anderson*, 328 U.S. at 703) (emphasis added). In this case, the "nature" of the crime alleged is the unlawful use of a weapon. The location of the act constituting the crime was respondent's use of the weapon in the state of Maryland. Respondent's crime, the use of the weapon, began and ended in Maryland and did not occur in the state of New Jersey.

The government also argues that 18 U.S.C. § 924(c)(1) has more than one *actus reus* and that venue is proper in any district where the *actus reus* was committed. In determining venue, the Court should look at the "nature of the crime alleged and the location of the acts constituting it." *Cabrales*, 118 S. Ct. at 1776. Here the crime alleged is the use of a firearm during a violent crime and Maryand was the sole location of the *actus reus* that constitutes the crime.

[5] In support of this proposition, the government cites numerous conspiracy cases and aiding and abetting cases. Br. of Petitioner at 15-16 and n.4-n.6. Respondent does not dispute the general rule of law that a conspiracy trial can be held in any district where an overt act occurred. In this case, respondent was charged with a substantive count of violating 18 U.S.C. § 924(c)(1), not a conspiracy to violate that section. He alone was charged in count five. While count five of the indictment alleged that respondent aided and abetter others in violation of 18 U.S.C. § 2, J.A. 20, that theory of culpability was not advanced at trial and was not submitted to the jury. J.A. 61-63. Count five of the indictment describes activity in which Rodriguez-Moreno "alone, untied to others, engaged." *Cabrales*, 118 S.Ct. at 1777.

[6] *Actus reus* denotes "such result of human conduct as the law seeks to prevent." 1A C.J.S. *Actual*, 773 (1985).

I. THE CONSTITUTION DEMANDS THAT A CRIMINAL DEFENDANT BE TRIED WHERE THE ACTS OF THE ACCUSED THAT VIOLATE A STATUTE OCCURRED.

Article III, Section 2, Clause 3 of the Constitution states that "The Trial of all Crimes . . . shall be held in the State where said Crimes shall have been committed."[7] To "underscore the importance of this safeguard, it was reinforced by the provision of the Bill of Rights requiring trial 'by an impartial jury of the State and district wherein the crime was respondent's use of the weapon in the state *Johnson*, 323 U.S. 273, 275 (1944) (quoting U.S. CONST. Sixth Amend.).[8] Thus, by Constitutional command, venue may only be placed *where the crime was committed*. *United States v. Cores*, 356 U.S. 405, 407 (1958) ("The Constitution makes it clear that determination of proper

[7] The Constitution of the United States provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by law have directed." U.S. CONST. art. III, § 2, cl. 3.

[8] Amendment VI provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process of obtaining witnesses in his favor, and have the Assistance of Counsel for his defense." U.S. CONST. amend VI.

venue in a criminal case requires determination of where the crime was committed.")

The Constitutional provisions, however, "do not furnish guidance for determination of the place of the crime. That place is determined by *the acts of the accused* that violate a statute." *Johnston*, 351 U.S. at 220 (emphasis added); *accord United States v. Anderson*, 328 U.S. 699, 705 (1946) ("It is, of course, necessary in order to decide where the crime is committed to ascertain . . . what *acts of the defendant* constituted the violation.") (emphasis added).

Venue issues are discrete; in each case the statute must be analyzed to determine the "nature of the crime alleged and the location of the act or acts constituting it." *Anderson*, 328 U.S. at 703; *accord Travis v. United States*, 364 U.S. 631, 635 (1960) ("The decisions are discrete, each looking to the nature of the crime charged."). In deciding where an offense was committed and thus where venue lies, "the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *Cabrales*, 118 S.Ct. at 1776, *Anderson*, 328 U.S. at 703.

In determining where a crime was "committed," and thus where venue lies, venue provisions in Acts of Congress should not be so freely construed as to give the Government the choice of "'a tribunal favorable' to it." *Travis v. United States*, 364 U.S. 631, 634 (1961) (quoting *United States v. Johnson*, 323 U.S. 273, 275). Thus, analysis begins "from the premise that questions of venue are more than matters of mere procedure. 'They raise deep issues of public policy in the light of which legislation must be construed.'" *Id.*

II. VENUE WAS ONLY PROPER IN MARYLAND BECAUSE THAT IS WHERE THE RESPONDENT'S ALLEGED *ACTUS REUS* OCCURRED.

The government concedes that venue is only proper "in a district where the defendant commits (or is legally responsible for) an *actus reus* element of the offense." Br. of Petitioner at 13. Nevertheless, the government contends that venue was proper in New Jersey. The government's contention is based on an erroneous interpretation of the statute. First, the government erroneously omits the "during" requirement from the statute by claiming that under the statute the defendant must only "commit another federal crime (here, a crime of violence) *and* use or carry a gun in relation to that crime." Br. of Petitioner at 25 (emphasis in original). By reading the "during" requirement out of the acts, the government is able to argue that there are, in fact, two *actus reus* elements to the firearm statute: [1] the use of the gun and [2] the commission of the crime of violence. *Id.* at 19. Consequently, the government claims that venue is proper because while the first element (the use of the gun) occurred only in Maryland, the second element (the commission of the crime of violence) occurred in both Maryland and New Jersey. *Id.* at 19-20. The government is wrong.

The government is incorrect in claiming that the New Jersey kidnapping is "an essential element of the [firearm] crime." Br. of Petitioner at 24. If the government proved that respondent *used* or *carried* a firearm in Maryland (the first *actus reus* of the government's erroneous definition of 924(c)(1)), and then it proved that the respondent went to New Jersey, either before or after he used or carried the firearm, and he *committed an act of violence* in New Jersey (the second actus reus of the government's erroneous definition of 924(c)(1)), the government could not sustain a conviction because the government must prove that the firearm was used *during*

a crime of violence. See *United States v. Correa-Ventura*, 6 F.3d 1070, 1083 (5th Cir. 1993); *United States v. Stewart*, 779 F.2d 538, 540 (9th Cir. 1986) (Kennedy, J.) ('[t]he relation between the firearm and the underlying offense is an essential element of the crime"). Consequently, the New Jersey kidnapping is completely irrelevant to the firearm crime, because respondent did not *use* or *carry* a gun *during* the New Jersey crime.

Contrary to the government's claims, there is exactly one *actus reus* for this statute, namely that the defendant used or carried a firearm *during and in relation to* a crime of violence. The *actus reus* is not the use of a firearm, instead it is that the defendant used the firearm during another federal crime. *Correa-Ventura*, 6 F.3d at 1083. Therefore, venue must be where the *actus reus* of the crime occurred, namely in Maryland. *Cabrales*, 118 S. Ct. at 1776.

Moreover, the firearm crime cannot be prosecuted in New Jersey because it is not a continuing offense. *Cf. United States v. Cores*, 356 U.S. 405, 408 (1958) (Crime of remaining in the United States after the expiration of a landing permit for visiting sailors is continually violated in every district the defendant goes after the permit expires); *Armour Packing Co. v. United States*, 209 U.S. 56, 74 (1908) (Crime to procure transportation of goods at a lower rate than the published tariffs is committed "[w]herever such transportation is received"). A continuing offense is simply an offense that is "committed" in more than one district, and therefore can be prosecuted in more than one district.[9] 18 U.S.C.

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[9] Conspiracy, which is a subset of the "continuing offense" doctrine is not at issue in this case; however, the analysis herein applies equally to a conspiracy. Conspiracy, like many crimes is capable of being a "continuing offense". *See, e.g., Hyde v. United States*, 225 U.S. 347, 361-366 (1912). The crime of conspiracy consists of the "agreement" to accomplish criminal means, and the crime is "committed" by the various acts of conspirators that show their adherence to the common scheme. *Id.* So wherever any co-conspirators commit *acts* in furtherance of the conspiracy, that is where the "agreement", or part of it, took place. *Id.* Courts have reasoned that the defendant's own act—that of agreeing or signing on to the conspiracy or the organization—incorporates by reference the acts of others and makes him vicariously liable for them. *See id.* (recognizing a "constructive" presence of coconspirators in the district where acts in furtherance of conspiracy were committed). But in the firearm context here, there is no act by the defendant that signals an agreement with the other defendants to violate the firearm statute at issue in the instant case.

§ 3237(a). Thus, in the context of a "continuing offense," the crime is committed "wherever the wrongdoer roamed." *Travis*, 364 U.S. at 634 (citing *United States v. Cores*, 356 U.S. 405).[10] In the instant case, the respondent did not "roam" with the firearm; consequently, the firearm violation was not a continuing offense. Indeed, § 3237 only applies to crimes that are "committed" in more than one district. Stated another way, even Congress cannot specify that a trial for a crime can be held somewhere other than where the crime was "committed." In this regard, this Court has cautioned that § 3237 must be "read in light of the Constitutional requirements and the explicit provision" of the offense. *Travis*, 364 U.S. at 637; see also *Johnston*, 351 U.S. at 220 (Douglas J., dissenting) (Statute should be construed against the two historic Constitutional provisions, and any doubts should be resolved in favor of the citizen). Therefore, § 3237 can *only* Constitutionally apply to crimes that are "committed" in more than one place.

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[10] *Cores* was possibly more limited a holding than *Travis* indicated. In *Cores*, the Court held that venue was proper where the defendant was "found"—it did not decide the issue of whether the defendant could be prosecuted in any district where he may have been after the expiration of the permit. *Cores*, 356 U.S. at 409.

III. THE COURT'S DECISION IN *CABRALES* REQUIRES THE REVERSAL OF RESPONDENT'S CONVICTION.

Last term, the Court clearly held that venue must be determined by the acts of the accused that violate a statute. *Cabrales*, 118 S. Ct. at 1776; *Johnston*, 351 U.S. at 220; see also *Anderson*, 328 U.S. at 703-705 ("It is, of course, necessary in order to decide where the crime is committed to ascertain . . . what *acts of the defendant* constituted the violation." (emphasis added)); *id.* at 703 (Statute must be analyzed to determine the "nature of the crime alleged and the location of the act or acts constituting it."). Nevertheless, the government argues that the Court should ignore *Cabrales's* holding and find that venue was proper in New Jersey even though the acts of the accused which violated the statute did not occur in New Jersey. See, Br. of Petitioner at 28-30. Once again, the government is wrong.

In *Cabrales*, the Court held that venue in a money laundering case was improper in Missouri, the state that was the source of the money that was laundered. *Cabrales*, 118 S. Ct. at 1777. Although the Court disagreed with the government regarding whether venue could be based on the "essential element" of where the underlying crimes occurred, see *Cabrales*, 118 S. Ct. at 1776, the government now raises the exact same argument and asks this Court to find that venue was proper in New Jersey because that is where the "essential element" of the underlying crime occurred. Br. of Petitioner at 24.

The government argues that this Court found venue improper in *Cabrales* because the defendant had not been charged with a substantive crime in Missouri. Br. of Petitioner at 28-29. The government's analysis if *Cabrales* is incorrect. Venue was improper in Missouri, in *Cabrales*,

because the defendant had not committed the *actus reus* that violated the money-laundering statute in Missouri. *Cabrales*, 118 S.Ct. at 1776-1777. Likewise, respondent had not committed the *actus reus* that violated the firearm statute in New Jersey. As explained *supra*, the *actus reus* that violates § 924(c)(1) is "*carrying or using* a firearm *during* a crime of violence." 18 U.S.C. § 924(c)(1) (emphasis added). As the respondent did not commit the *actus reus* in New Jersey, *Cabrales* requires this Court to reverse the respondent's conviction.

Moreover, contrary to the government's arguments, the government's venue claim was stronger in *Cabrales* than it is in the instant case. One of the elements of money laundering is that the proceeds must result from unlawful activity or other crimes. See, 18 U.S.C. § 1956(a)(1). Consequently, one of the elements of the charged crime occurred in Missouri and the government had, at least, a weak claim that venue should be based there. Here, on the other hand, the fact that the kidnapping occurred in New Jersey is completely irrelevant to the firearm charge. The government had to prove that the gun was used *during* the kidnapping.

Consequently, the fact that there was a kidnapping in New Jersey previous to the gun being used, did not in anyway establish that the gun was used during a kidnapping that occurred in New Jersey.

In sum, *Cabrales* requires the reversal of respondent's conviction because *Cabrales* requires venue to be based on the acts of the offender that violate the statute, and the respondent did not commit any acts that violate the firearm statute in New Jersey. Moreover, unlike *Cabrales*, there was no element of the crime that occurred in an improper venue state.

IV. THE THIRD CIRCUIT CORRECTLY APPLIED THE ACTIVE VERB TEST IN HOLDING THAT VENUE WAS IMPROPER IN NEW JERSEY.

This Court, as well as every lower court that has analyzed a venue issue, has generally performed the same analysis—the terms of the statute are analyzed to determine the proscribed conduct (*i.e.*, the *actus reus*), then the court determines where that conduct was "committed," and thus where venue lies. The holdings and language of *Cabrales*,[11] *Travis*,[12] *Cores*,[13] *Johnston*,[14] *Anderson*,[15] *Johnson*,[16] *Midstate Horticultural Company*,[17] *Lombardo*,[18] *Freeman*,[19] as well as all other precedent of this Court, confirm this approach.

The court below, along with a number of other circuit courts has reflected this emphasis on the *acts* in determining venue when employing the "key verbs" analysis: the crime is "committed" where the person does the *act* prohibited by the "key verb".[20] The key verb test is an

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[11] 118 S. Ct. at 1775-1776.

[12] In *Travis*, the Court focused on the statutory phrase "on file with the Board" to determine that the statute penalized "only the single act of having a false statement at a specified place"; thus, the Court held venue to be proper only where the false statement was filed. 364 U.S. at 635-637.

[13] In *Cores*, the Court focused on the verb "remains" to determine that the crime is "committed" wherever the defendant "remains" after expiration of the landing permit; thus, holding that the venue is proper and the crime can be prosecuted where the defendant "willfully remains after the permit expires." 356 U.S. at 409.

[14] In *Johnston*, the Court focused on the statutory phrase "knowingly fail or neglect or refuse to perform any duty required of him under . . . this title" to determine that "where the crime charged is a failure to do a legally required act, the place fixed for its performance fixes the situs of the crime." 351 U.S. at 220.

[15] In *Anderson*, the Court analyzed the statute to determine that it mandated the defendant "to take the oath"; the Court, finding that the place of performance and the place of refusal to *act* were identical, held that venue is proper in that district in which the defendant "acted" by refusing "to take the oath". 328 U.S. at 706.

[16] In *United States v. Johnson*, 323 U.S. 273 (1944), all nine justices analyzed the case by focusing on the verb phrase "use the mails"; the disagreement between the majority and the dissent centered upon the issue whether that phrase denoted a "continuing offense", not whether venue could be placed by focusing on other elements of the crime.

[17] In *United States v. Midstate Horticultural Co.*, 306 U.S. 161, 166-167 (1939), the Court focused on the statutory language of "granting and receiving of rebates" to hold that venue was improper in a district other than where the "granting" or "receiving" were alleged to have occurred.

[18] In *United States v. Lombardo*, 241 U.S. 73, 76 (1915), the Court focused on the verb "file" as being the criminal act. The Court, in rejecting the government's attempt to characterize the crime as a "continuing offense", stated that it is "constrained by the meaning of the words of a statute." *Id.* at 78.

[19] In *United States v. Freeman*, 239 U.S. 117, 119-120 (1915), the Court, equating the statutory language "ship" to "transport", held that a statute making it a crime to "ship" into any other State any package of intoxicating liquor could be prosecuted where the liquor was shipped.

[20] The First, Third, Fourth, Eighth, Ninth and Tenth Circuits have adopted the "verb test," which analyzes the operative verbs, key terms, and policies underlying the statute defining the offense. *United States v. Griffin*, 814 F.2d 806, 810 (1st Cir. 1987); *United States v. Georgacarakos*, 988 F.2d 1289, 1293 (1st Cir. 1993) ("To determine venue, we examine 'the key verbs in the statute defining the criminal offense' to find the scope of the relevant conduct." (quoting *United States v. Tedesco*, 635 F.2d 902, 905 (1st Cir. 1980)); *United States v. Donahue*, 885 F.2d 45, 50 (3d Cir. 1989) ("[L]ook at the statutory verb in the description of the offense in determining where an offense was committed."); *United States v. Cofield*, 11 F.3d 413, 416 (4th Cir. 1994) ("[W]e have adopted the 'verb test' as an interpretative aid"); *United States v. Crawford*, 115 F.3d 1397, 1405 (8th Cir. 1997) (applying the "active verb" or "key verb" test to the Child Support Recovery Act); *United States v. Corona*, 34 F.3d 876, 879 (9th Cir. 1994) (Ninth Circuit adopted "key verbs" test, which examines the verbs in a statute that defines the criminal conduct to determine where the offense was committed.); *United States v. Ryan*, 894 F.2d 355, 360 (10th Cir. 1990) ("Courts usually examine the verbs employed in the

accepted and useful tool utilized by courts to determine the place for trial when the statute does not specically set forth venue. One commentator has referred to the "key verb" test as "the first method for determining proper venue in offenses lacking venue provision." 25 Moore's Federal Practice § 618.05[3][b][I] at 618-13, -14 (3d ed. 1982) citing *United States v. Anderson*, 328 699, 703 (1946) (other citations omitted).

This key verb test was correctly applied by the Third Circuit in the instant case. In reversing respondent's conviction, the Court below applied the "verb test" and found that "18 U.S.C. § 924(c)(1) unambiguously designates the criminal conduct that is prohibited as 'using' or 'carrying' a firearm. Pet. App. 15a. The court concluded that since the carrying or using of a firearm occurred only in Maryland, "Moreno could only have been properly tried in Maryland." *Id.* Moreover, if "Congress has not provided an express venue provision in conjunction with a criminal offense [the Court should look] to the verbs defining the criminal offense and the purpose underlying the current statute to determine proper venue." [21]

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statute to define the offense."); *United States v. Medina Ramos*, 834 F.2d 874, 876 (10th Cir. 1987).

[21] Other circuit courts have adopted the so-called "substantial contacts" test to determine venue which takes into account a number of factors, the most important being the site of the defendant's acts. The "substantial contacts" test, first articulated by the Second Circuit and since adopted by the Sixth and Seventh Circuits, takes into account a number of factors including the site of defendant's acts and the effect of the criminal conduct. *United States v. Reed*, 773 F.2d 477 (2d Cir. 1985); *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1188-89 (2nd Cir. 1989); *United States v. Williams*, 778 F.2d 1213, 1215 (6th Cir. 1986); *United States v. Beddow*, 957 F.2d 1330 (6th Cir. 1992); *United States v. Chappel*, 854 F.2d 190, 193 (7th Cir. 1988). Regardless of the name, there is no appreciable difference between the lower court "tests" for determining venue—each looks to the language of the statute to determine the *actus reus* of the crime.

United States v. Crawford, 117 F.3d 137, 139 (4th Cir. 1997) (citations omitted).

In this case, use of the verb test is extremely helpful because it supports Congress's clear intent to prevent the use of the firearm and not to merely treat this separate crime as a sentence enhancement. See *infra* at 26-27. Because Congress has not provided "an express venue provision" for 18 U.S.C. § 924(c)(1), the Court should look to the statute's verbs "using" and "carrying" as describing the conduct that Congress outlawed; i.e., using or carrying a weapon. Both the purpose underlying the criminal statute and the key verb test require that the trial be conducted where the weapon was used and carried.[22]

As stated above, *Cabrales*, *Johnston* and *Anderson*, and all other precedent of this Court, suggest that the answer to the question of venue is to be found by analyzing each particular statute to determine the "acts" of the defendant that constitute the commission of the crime. *Cabrales*, 118 S.Ct. at 1776, *Johnston*, 351 U.S. at 220; *Anderson*, 328 U.S. at 705. Whether called the "acts" test, the "key verb" test, the "substantial contacts" test, or some other name, the same analysis is being performed—the terms of the statute are analyzed to determine the proscribed conduct (*i.e.*, actus reus), then it is determined where that conduct occurred, and thus where venue lies. Venue

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[22] Commentators have likewise confirmed the wisdom of this approach. See Charles A. Wright, *Federal Practice and Procedure*, § 302, at 199 (2d ed. 1982) (focuses on key verbs of statute to determine where the crime is committed); Norman Abrams, *Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula*, 9 UCLA L. Rev. 751, 777 (1962) (author finds the "verb test" important first step in determining venue in a multi-district conspiracy); Armistead M. Dobie, *Venue in Criminal Cases in the United States District Court*, 12 Va. L. Rev. 287, 289 (1926) (The "essential verb usually contains the key to the solution of the question: in what district was the crime committed.").

must be based on the "actus reus" element of the crime. Stated differently, venue cannot be based on the locality (if one exists) of any of the other elements of the offense. Determining venue on anything other than the "actus reus" of the defendant is unconstitutional, arbitrary, confusing, and will produce ad hoc decisions. In contrast, by focusing on the *act* that a statute makes criminal, the result is predictable and clear.

V. PROSECUTING THE FIREARM OFFENSE ANYWHERE OTHER THAN MARYLAND, WHERE THE CRIME WAS "COMMITTED", WOULD DISRESPECT THE CONSTITUTIONAL PROVISIONS AND THE POLICIES UNDERLYING THEM.

A. The Constitutional Safeguards Of Venue Are For The Protection Of The Accused, Not The Government.

The Constitution demands that crimes be prosecuted where the crime takes place. As the Court cautioned in *Johnson,* an expansive interpretation of venue could lead to needless hardship on the defendant who is forced to defend himself far from home and available defense resources, and could lead to "the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution." 323 U.S. at 275; *Travis,* 364 U.S. at 634 ("We are also aware that venue provisions in Acts of Congress should not be so freely construed as to give the Government the choice of 'a tribunal favorable' to it.").

Constitutional venue provisions are, first and foremost, for the protection of the accused. It may be more convenient for the government to prosecute respondent in New Jersey, but the Constitution is concerned about what is fair for those accused of crimes. As the lower court correctly noted, "Essentially, the government wants to have the *option* of venue—that is it does not want to be *restricted* to trying these cases" where the violation occurred. Pet. App. 16a. The Third Circuit had little sympathy for the government's argument regarding the hardship and inconvenience of having to prosecute the crime where it was committed. Pet. App. 16a. The court stated:

> Many constitutional guarantees for criminal defendants are inefficient and costly—the right to counsel comes to mind. Nevertheless, these guarantees form the bedrock principles of our criminal justice system and should not be hastily balanced away. *United States v. Johnson,* 323 U.S. 272, 276, 65 S.Ct. 249, 251, 89 L.Ed 236 (1944) ("If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy."). Pet. App. 16a.

The right to be tried where the crime was "committed" was one of the most important rights to the framers of the Constitution.[23] It was one of the few rights that is included in both the original text of the Constitution and the Bill of Rights. As one commentator put it: "With the adoption of this venue proposal, citizens of the United States were assured that constitutional limitations on venue had been established. Citizens could not be transported beyond the boundaries of the state in which the crime had been committed for the trial of the crime."

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[23] The venue provisions contained in the constitution were in reaction to English laws that permitted colonists as well as British soldiers to be tried in England when the alleged crime was committed in America. *See* Drew L. Kershen, *Vicinage,* 29 Okla. L. Rev. 801, 806-808 (1976). Resentment against these laws was so deep that the Declaration of Independence denounced King George III "[f]or transporting us beyond Seas to be tried for pretended offenses." *Id.* at 807. Indeed, this practice of England has been described as one of the precipitating factors of the American Revolution. *See, e.g.,* William H. Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue,* 43 Mich. L. Rev. 59, 63-67 (1944).

Drew L. Kershen, *Vicinage*, 29 Okla. L. Rev. 801, 808 (1976). Likewise, the government should not be allowed to transport respondent beyond the boundaries of Maryland, the only jurisdiction where he may have broken the firearms law.[24]

B. The "Acts" Test, While Upholding The Constitutional Venue Provisions, Will Not Undercut The Effective Administration Of Criminal Laws.

Contrary to the government's assertion, the "acts" test will not "unudercut the effective administration of criminal law." Br. of Petitioner at 30. The government contends that trying the firearm charge in Maryland will lead to ineffective administration of justice for three reasons. First, the government claims that it could try respondent twice, once for the kidnapping and once for using a firearm. *Id.* The government asserts that if this Court requires that the trial for a violation of 18 U.S.C. § 924 (c)(1) be held where the firearm was used or carried, the defendant could be forced to trial twice, in two different locations. Such an approach, "would do little to benefit respondent." Br. of Petitioner at 30.

In fact, such a rule would benefit respondent. If Mr. Moreno were charged with the kidnapping in New Jersey and charged with the weapons offense in Maryland, he could exercise his Constitutional rights and demand that he be tried twice. He could also, however, elect to utilize Federal Rule of Criminal Procedure 21 and move to have the cases tried together in either district.

Federal Rule of Criminal Proceure 21(b) provides:

> For convenience of parties and witnesses, and in the interest of justice, the court *upon motion of the defendant* may transfer the proceedings as to that defendant or any one or more of the counts thereof to another district. (emphasis added).

[24] Furthermore, the convenience of the government is irrelevant, both because policy considerations can never trump the Constitution and also because the government has never claimed that it could not prosecute respondent in Maryland.

Certainly the government would have no objection if respondent wanted to have all of the charges tried in the District of New Jersey. Respondent could waive his Constitutional right to venue just as he could waive other Constitutional rights.

Next, the government claims that if respondent's prosecution under 18 U.S.C. § 924(c)(1) were held in Maryland, the government would "in effect, be required to prove the kidnapping offense twice." Br. of Petitioner at 30. This assertion is incorrect. The government would be free to try both the kidnapping of Mr. Avendano and the firearm charge in Maryland and there would be only one trial.

If, however, the government elected to try the case twice, the kidnapping of Mr. Avendano would have already been tried in New Jersey. If respondent were acquitted of that offense,[25] there would be no subsequent prosecution on the firearm charge anywhere. Even if respondent were previously convicted in New Jersey of kidnapping Mr. Avendano, the government's subsequent prosecution in Maryland would have to establish that the kidnapping continued into Maryland and that the firearm was used there. In any event, the unique set of facts in respondent's case can hardly be described as a major burden to the government.

[25] Count five of the indictment alleged three underlying offenses; the drug transaction, the kidnapping of Mrs. Avendano and the kidnapping of Mr. Avendano. Respondent was acquitted of the drug charge at the close of the government's case in chief. Pet. App. 7a-8a. The firearm which was the subject of count five was not used in the kidnapping of Mrs. Avendano. Br. of Petitioner at 7, n.2. Count three which charged the kidnapping of Mrs. Avendano was incorrectly submitted to the jury as one of the underlying offenses of count five. *Id.*

Finally, the government acknowledges that while the Sentencing Guidelines enhancements for the use of a weapon are helpful, they do not fully accomplish the legislative goal of enhanced punishment. Br. of Petitioner at 31-32. That additional punishment is, according to the government, not enough of an enhancement and respondent's conviction should thus be reinstated. "The difference would not be negligible here, and nothing in the Constitution's venue provision justifies such a windfall for the defendant." Br. of Petitioner at 33.

The venue provisions in the Constitution are for the protection of the defendant in a criminal case. If those provisions result in a "windfall" for the defendant, such a windfall would certainly be short lived. Common sense suggests that the greater the windfall, the greater the chance that the government will muster its resources and try the defendant a second time. When a defendant successfully challenges venue, the government is entitled to try him again in the proper district. *United States v. Scott*, 437 U.S. 82, 98-99 (1978).

In many cases, however, the government may elect to proceed under the Sentencing Guidelines without resorting to 18 U.S.C. § 924, as it did in this case with five of the respondent's codefendants. Through the adoption of the United States Sentencing Guidelines, Congress has provided for enhanced penalties where a gun was used in connection with a serious felony. For the most part, the Guidelines provide for increasing the particular offense level by two or more levels if a firearm was used. See, for example, U.S.S.G. § 2A2.2(b)(2) (an increase of three to five levels for use of a firearm in an aggravated assault); U.S.S.G. § 2A2.4(b)(1) (a three level increase for possession of a firearm when obstructing or impeding officers); U.S.S.G. § 2A3.1(b)(1) (an increase of four levels for the use or display of a dangerous weapon in a sexual assault); U.S.S.G. § 2A4.1(b)(3) (an increase of two levels if a dangerous weapon was used in a kidnapping, abduction or unlawful restraint); U.S.S.G. § 2A6.2(b)(1)(C) (an increase of two to four levels for possession or use of a dangerous weapon in a stalking or domestic violence case); U.S.S.G. § 2B2.1(b)(4) (an increase of two levels if a dangerous weapon was used during the course of a burglary); U.S.S.G. § 2B2.3(b)(2) (an increase of two levels if a firearm was used during a trespass); U.S.S.G. § 2B3.1(b)(2) (an increase of between three and seven levels if a weapon was used during a robbery); U.S.S.G. § 2B3.2(b)(3) an increase of between three and seven levels if a weapon was used during an extortion); U.S.S.G. § 2B5.1(b)(3) (an increase of at least two levels if a firearm was used in a counterfeiting offense); and U.S.S.G. § 2D1.1(b)(1) (a two level increase if a weapon was possessed in any drug transaction). In many cases, these multi-level increases permit sentence increases well in excess of the 60 months permitted by 18 U.S.C. § 924(c).

In this case, one of respondent's codefendants, Milton Palma-Ruedes was sentenced to 135 months imprisonment. Pet. App. 8a. Like respondent, he was convicted of the kidnapping counts and the drug count was dismissed against him at the end of the government's case in chief. *Id.* at 7a-8a. While Palma-Ruedes was not charged under 18 U.S.C. § 924(c)(1), he received a two level enhancement for possessing a firearm during the kidnappings. In many respects, his case was most similar to respondent's. Respondent, on the other hand, was sentenced to 147 months. *Id.*

The Judgment of the United States Court of Appeals for the Third Circuit was corrected on September 3, 1997 in response to a motion made by the government. The corrected judgment provides that "the remaining judgments against Moreno are vacated and remanded for sentencing." J.A. 2-3. If respondent is resentenced, the trial court would raise his offense level by two levels because

he possessed a weapon. The resulting sentencing range would be 108-135 months. If the government chooses not to prosecute respondent in Maryland, his "windfall" could be as little as 12 months and at most 39 months. A sentence of 135 months would be identical to that of codefendant Palma-Ruedes.

In any event these policy arguments cannot trump the Constitution. If, on occasion, the government is slightly inconvenienced, its complaint is with the Framers who, in both the Constitution and the Bill of Rights, required all crimes to be prosecuted in the state where they were committed.

VI. THE SPARSE LEGISLATIVE HISTORY DOES NOT SUPPORT THE GOVERNMENT'S CONTENTION THAT 18 U.S.C. § 924(c) IS BASICALLY A SENTENCING ENHANCEMENT.

18 U.S.C. § 924 was enacted by Congress to prevent and punish weapons offenses, yet the government relies on the dissenting opinion below for the proposition that "a central focus, if not *the* central focus, of the statute is the commission of the underlying crime."[26] Br. of Petitioner at 9, Pet. App. at 49a-50a. The legislative history and case law, however, do not support that proposition.

Congress was certainly not focusing on the underlying crime when it enacted and later revised 18 U.S.C. § 924. It clearly was focusing on gun control and punishing the

[26] Indeed, the dissent rewrites the statute by changing key phrases which would "presumably permit venue in any district in which the crime of violence or drug trafficking crime was committed." Pet. App. 42a-43a. The suggested change, however, would create a very different statute where the use or carrying of a weapon is a mere sentencing enhancement to the underlying crime. Both this Court and Congress have held that 18 U.S.C. § 924(c)(1) was not merely a sentencing enhancement, but a new crime altogether. *Simpson v. United States*, 435 U.S. 6, 10 (1978); S. Rep. No. 98-225, at 313 (1983).

prohibited use of weapons. 18 U.S.C. § 924(c)(1) was enacted as part of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1223-1224. The House Bill (H.R. 17745) was intended to amend Title 18 of the United States Code to "provide for better control of interstate traffic in firearms." 114 Cong. Rec. 22,223 (1968). The Congressional findings set forth the national problems presented by firearms and other weapons. *Id.*[27] Thus, 18 U.S.C. § 924 was enacted with the sole focus of prohibiting and punishing the illegal use of weapons. There is no focus, central or otherwise, on the underlying crimes.

18 U.S.C. § 924 has been amended on numerous occasions. In 1983, 15 years after its original enactment, major revisions to the statute were adopted. At that time, Congress adopted this Court's decision in *Simpson v. United States*, 435 U.S. 6 (1978) and found that "Section 924 (c) sets out an offense distinct from the underlying felony and is not simply a penalty provision." S. Rep. No. 98-225, at 313 (1983). Therefore, the dissent's below reliance on the legislative history to imply that this statute is nothing but a sentencing enhancement for the underlying felony is seriously misplaced.

[27] The Congressional debate did not focus on any underlying crimes. When discussing the enactment of 18 U.S.C. § 924, Congress debated, for the most part, whether they could Constitutionally apply Federal weapons violations on state crimes prosecuted in state courts. 114 Cong. Rec. at 22,229-22,234. In limiting the application of 18 U.S.C. § 924 to federal crimes, Congress eventually agreed with the suggestion that "this new Federal crime we are creating should remain within its own boundaries and not trespass upon the domain of the States." *Id.* at 22,232.

CONCLUSION

The decision of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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